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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1654

PETER BRANTI, As Public Defender of Rockland County,
Petitioner

v.

AARON FINKEL and ALAN TABAKMAN,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

(Numbers in parentheses refer to Pages of Appendix)

Rockland County is governed by a Legislature consisting of eighteen members, elected from each of the county's five towns in accordance with that town's proportion of the county population.

The 1977 quadrennial County Legislative elections left the Democratic Party in firm control of that body,

with eleven of the eighteen newly elected members representing that party. The major part of this majority came from the totally Democratic delegations of the Towns of Ramapo and Haverstraw, with, respectively, six and two legislators.

In addition to the routine re-organization of County government, which, of course, occurred on a regular basis after each legislative election, this incoming Democratic majority was faced with an unprecedented additional opportunity which occurred as the result of the concurrent expiration of the term of the Republican-appointed Public Defender, Frank Barone. Thus, the majority party had an additional opportunity, which it was quick to seize, to reward Democratic attorneys who actively supported the successful majority with the political patronage posts of all Assistant Public Defenders and all Assistant County Attorneys, as well as other regular county positions.

The political maneuvering began almost immediately after the electoral results were declared. The Democratic majority, to the exclusion of all other legislators, formed a group known as "The Democratic Caucus" (121) to arbitrate patronage disposition among its members in a prompt, efficient manner.

The Town of Ramapo, dealing from its obvious strength as repository of six of the eleven members of the Democratic caucus, desired the right to select the Chairman and Clerk of the Legislature (312). The Town of Haverstraw, second only to Ramapo as a Democratic stronghold, was allocated the two major appointments of County Attorney and Public Defender, but as the result of that largesse, was not entitled to the appointment of any of the assistants to

these positions. These secondary appointments, numbering fourteen in all and consisting of Assistant Public Defenders and Assistant County Attorneys, were treated as a group and were divided among the Democratic Town delegations (190). These positions were allocated as follows: Town of Ramapo, 6 attorneys; Clarkstown, 4; Orangetown, 1; Stony Point, 1 or 2; Haverstraw, none. The names selected were to be submitted to the appointing authority by the Democratic Chairperson of the County, *Finkel v. Branti,* 457 F. Supp. 1284, 1287 (SDNY 1978).

At the time of these political maneuvers, respondents were serving in the capacity of Assistant Public Defenders. AARON FINKEL had been appointed to that position in 1971 (9) by then Democratic-appointed Public Defender, Arnold Becker (76); ALAN TABAKMAN had been appointed by Mr. Becker's Republican-appointed successor, Frank Barone, in 1975. Both respondents believed their appointment to these positions to be permanent (76, 106) and, in the case of respondent FINKEL, the personnel form filed at the time of his original employment did, in fact, designate him as permanent (10).

Each respondent, acting individually, upon becoming aware that petitioner would be appointed the next Public Defender of Rockland County, both through newspaper articles and rumor current within the legal profession, sought out petitioner BRANTI to ascertain his position concerning their continued employment as Assistant Public Defenders. Respondent FINKEL had two meetings with petitioner, the second after the publication of a newspaper article (plaintiffs' Exhibit 7, 81-82), indicating that the County Legislators would make the appointments of Assistant Public Defenders.

FINKEL indicated that he wished to remain as Assistant Public Defender but was told, "Pete [BRANTI] said it is not up to him." (80). Respondent TABAKMAN also discussed his continuation of employment at a Christmas cocktail party held at the office of Rockland County District Attorney, Kenneth Gribetz, but was told by petitioner BRANTI that the power to make the appointments of Assistant Public Defenders was in the hands of the Democratic caucus (108).

After having individually received these negative responses from petitioner, respondents, in concert, prepared a letter (plaintiffs' Exhibit 8 in evidence, 83-84) which was served upon petitioner BRANTI on December 30, 1977 and advised him of their desire and availability to continue serving as Assistant Public Defenders, together with their reliance upon the decisions of this Court in support of their Constitutional right to such continued employment (19, 83-84). On January 3, 1978, petitioner was appointed the position of Public Defender. Notwithstanding respondents' request for continued employment, petitioner began the process of executing termination notices for six Assistant Public Defenders, including respondents FINKEL AND TABAKMAN, 457 F. Supp. 1285.

On January 4th, this action was commenced by way of Temporary Restraining Order and Order to Show Cause. After a preliminary hearing, followed by a plenary trial, the United States District Court issued a decision on September 29, 1978 permanently enjoining the discharge of respondents on the sole ground of their political belief. Final Judgment was signed by District Judge BRODERICK on October 10, 1978 and unanimously affirmed by the Circuit Court of Appeals for the Second Circuit on February 20, 1979.

Throughout the course of these proceedings petitioner has been enjoined from "terminating or attempting to terminate, alter, change or in any way effect the respondents' current employment status as Assistant Public Defenders for the County of Rockland." (21). From the issuance of the Temporary Restraining Order until some time in May, respondents continued to receive their salary checks but were not permitted by petitioner to perform any of the duties of Assistant Public Defenders. In May of 1978 petitioner's counsel arrived at the dubious legal conclusion that the issuance of respondents' pay checks by the County of Rockland, and the subsequent holding of these checks in escrow by the County Attorney's office, would satisfy the terms of the Temporary Restraining Order. The District Judge's disagreement with that interpretation of his Order is apparent in footnote 4 of his decision, 457 F. Supp. 1285-1286. In October of 1978, petitioner BRANTI reassigned respondents to their duties as Assistant Public Defenders and resumed the issuance of their salary checks. Respondents have now been serving in exemplary fashion continously since October of 1978.

SUMMARY OF ARGUMENT

1. The basic issue presented to this Court is the Constitutional permissability of a patronage system which excludes all members of the "wrong" political party solely because of their failure to support the candidates of the majority party and their consequent failure to obtain sponsorship by such successfully elected Legislators. This, in turn, must be determined by placing the patronage system which denied respondents herein continued employment beneath the spotlight of

the three opinions in *Elrod v. Burns,* 427 U.S. 347 (1976). The plurality, in a detailed, broad-ranging decision, held that the practice of patronage dismissals is unconstitutional. The concurrence concisely set forth the five criteria used by Judge BRODERICK as the law of *Elrod* at its narrowest in determining this case at a trial level, while the dissent indicates that, although there are certain plaintiffs who could legitimately assert First Amendment interests, plaintiffs *Burns,* et al, were not among them. The dissenting opinion also expresses a desire to have a fully developed record justifying the fears of the plurality prior to ruling a patronage system unconstitutional. Respondents herein contend that the flagrant and unashamed politicizing of the quasi-fiduciary position of Assistant Public Defender by petitioner is constitutionally abhorent by the standards of all three opinions in *Elrod.*

Political sponsorship as a requisite for the retention of governmental employment is, in and of itself, a sufficient infringement upon First Amendment freedom of speech to render it constitutionally impermissable, even in the absence of other political evils such as coercion to change political allegiance, support of the election of certain candidates, or contribution of funds to these candidates.

2. Attorneys are not, *ipso facto,* confidential and policy-making employees. The issue of confidentiality and policy-making must be decided on a case-by-case basis and is dependent upon a factual showing that such relationship exists. The burden of proof lies upon petitioner to show a legitimate factual basis justifying his acknowledged First Amendment encroachment.

3. Petitioner's reliance upon this Court's decision in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977) is misplaced. The trial Judge concluded, after exhaustive testimony, that respondents' political affiliation and their subsequent lack of sponsorship by a member of the Democratic majority was the *sole* reason petitioner attempted to discharge them. The testimony of petitioner BRANTI was clearly contradicted by that of several other witnesses and it is a fundamental rule of this Court that the trial Judge shall have great discretion where the credibility of witnesses is involved.

4. The Fourth Circuit decision in *Ramey* v. *Harber,* 589 F. 2nd 753, (4th Circuit, 1973), Cert. denied —— U.S. ——, 61 L. Ed. 2nd 275, is in no way contrary to the decision of the Second Circuit in the case at bar; the Fourth Circuit merely refused to apply an *Elrod* fact pattern retroactively to a situation which existed prior to this Court's *Elrod* decision.

POINT I

A Patronage System Which Permits The Dismissal Of All Members Of The Minority Political Party Is Constitutionally Invalid.

The District Court below has found, 457 F. Supp. 1287, and petitoner has virtually conceded, that respondents FINKEL and TABAKMAN could not have been continued in their employment in the governmental positions of Assistant Public Defender absent the sponsorship of a member of the "Democratic Caucus." Petitioner contends that such a "mere" sponsorship does not constitute prohibitive infringement of First Amendment rights, despite this Court's apparent hold-

ing to the contrary. Indeed, the *Elrod* plurality decision refers to the term "sponsorship" on three separate occasions; even the dissent, in footnote 4 (427 U.S. 381) implies reconsideration of the *Elrod* conclusion in the presence of employment exclusion as the result of lack of " 'right' political posture or *sponsorship*" (emphasis supplied). It is apparently petitioner's position that there is a significant differentiation between "mere" sponsorship and sponsorship in the presence of such coercive activity as change of allegiance to the majority party, contribution of money or participation in the election of majority candidates. This line of reasoning is specious in several respects. To begin with, it can be assumed that any of the three above described coercive practices, specifically proscribed by the plurality, would, if engaged in by governmental employees, result in the requisite sponsorship by the successful candidate to whom allegiance has been pledged or on whose behalf funds or election activity have been expended. More insidious, however, is the fact that conversion of allegiance, contribution or work on behalf of successful candidates at least gives the government employee the option of submitting to such coercion to maintain his job as opposed to exercising his right to free speech and subsequent discharge. Sponsorship is the greater evil in that it fails to allow the governmental employee even that limited option.

Petitioner's conclusion that Assistant Public Defenders serve at the pleasure of the Public Defender and that their offices become vacant upon the appointment of a new Public Defender is gratuitous and without support in the record. The District Court, on authority of *Perry* v. *Sindermann,* 408 U.S. 593 (1972) and *Rivera Morales* v. *Benitez de Rexach,* 541 F. 2nd

882 (1st Circuit, 1976), in footnote 10, 457 F. Supp. 1292 determined that the removability of respondents by the Public Defender is irrelevant to the constitutional issues presented in this law suit. Indeed, the very issue in *Perry* v. *Sindermann,* concerned an untenured schoolteacher who claimed a legitimate expectancy of re-employment although he had no such contractual right. Petitioner admits that it was the practice of previous incoming Public Defenders to retain a bipartisan mix among their assistants; in fact, respondent FINKEL had served throughout such period of change and certainly had reason to expect, contrary to petitioner's allegations, that he would be continued in employment so long as he performed his duties properly (94). Accordingly, petitioner's contention that respondents' terms coincided with that of their appointing Public Defender is not only erroneous, but irrelevant.

Although District Judge BRODERICK found that petitioner had, *at most,* a veto power over the individuals recommended to him, his right to veto appointees as Assistant Public Defender extended only to those hand selected by the Democratic caucus. He clearly did not have the power independently to appoint anyone without the permission of the Democratic caucus, effectively excluding respondents here from their constitutionally protected right of continued employment despite their political affiliation.

Petitioner sets up his own strawman implying that an affirmance herein will eliminate sponsorship in the political process. Clearly, this is far beyond the scope of the facts in this case and, indeed, beyond the thrust of the *Elrod* decision. Involved here is not sponsorship in the abstract; it is the requirement of responsorship

of one who was already holding a government job and who has the *Perry* v. *Sinderman* gloss of reasonable expectation of retention. Certainly no-one involved in this matter has ever argued that patronage is an absolute wrong where applied to positions which have no constitutionally protected incumbence.[1] The requirement of sponsorship is constitutionally impermissable when it serves no compelling state interest.

Petitioner's argument that affirmance of the lower Court ruling would establish a barrier to attorneys entering governmental service is equally without merit. Although a person has no right to governmental service, and there are a number of reasons that such service can be terminated, the government may not deny a benefit to a person for reasons which infringe on his constitutionally protected rights. *Perry* v. *Sindermann, supra.*

Petitioner would have us believe that respondents waived their constitutional rights because they were appointed through the political system. Initially, it should be pointed out that this is certainly inapplicable to respondent FINKEL who was appointed by a Democratic Public Defender, served under the full term of a Republican Public Defender, and wished to retain that same employment by the successor Democratic-appointed petitioner herein. Also, as found by the District Court during the term of Frank Barone, during which

[1] There is, however, authority, in the *Elrod* dissent, that, even in the absence of the continuing employment expectation, the refusal to hire those who possessed all requisite qualifications except the "right" political posture or sponsorship would be violative of the First Amendment. *Elrod vs Burns*, supra 427 U.S. at 381, dissent footnote 4.

respondent TABAKMAN was appointed, there was an *equal* mix of four Republicans, four Democrats and one unregistered attorney serving as Assistant Public Defenders. ONLY PETITIONER HEREIN HAS ATTEMPTED TO POLITICIZE THE QUASI-FIDUCIARY POSITION OF PUBLIC DEFENDER BY HIS UNASHAMED SELECTION OF MEMBERS OF HIS OWN POLITICAL PARTY TO SERVE ON HIS STAFF.[2]

Petitioner makes much of his professional knowledge of every attorney specializing in criminal law in Rockland County. Surely, there must be at least one highly qualified *Republican* attorney in Rockland County. Can we truly characterize a system which permits the total elimination of representatives of one of the major political parties of this Country as "gentle and moderate?"

[2] The effect of partisan politics on political appointments is not of recent vintage. In 1835, a United States Senate Committee reported, "So long as * * * patronage * * * was limited to * * * nominating to accidental vacancies [it] could, of course, exercise but a moderate influence either over the body of the community or of the office-holders themselves: but * * * when [appointive] offices * * * were regarded as the spoils of victory * * * without respect to merit; when it became to be understood that all who held office, hold by the tenure of partisan zeal and party service it is easy to see that the certain, direct and inevitable tendency of such a state of things is to convert the entire body of those in office into corrupt and supple instruments of power, and to raise up a host of hungry, greedy and subservient partisans, ready for every service, however base and corrupt * * *." The Age of Jackson, University of South Carolina Press 1972. Report of a Senate Committee to inquire into the extent of Executive Patronage February 9, 1835, 1011-12; U.S. Congress Senate Documents 23d Congress, 2d Session, III document 109, pg. 45.

POINT II

Respondents Were Neither Policy-Making Nor Confidential Employees.

This Court's decision in *Elrod* recognized that there exist certain situations where a paramount state interest permits the discharge of otherwise constitutionally protected employees for political reasons. These categories which fall without the constitutional protection of *Elrod* are characterized by the concurring opinion as policy-making or confidential employees.

Petitioner urges this Court that *all* attorneys, merely by virtue of their status as attorneys, are, *ipso facto,* both policy-making and confidential employees. In support of this petitioner cites a New York State Supreme Court case, *Matter of Clarke* v. *O'Brien,* 91 Misc. 2nd 190, 397 N.Y.S. 2nd 509 (Supreme Court, Suffolk County 1975) affirmed 56 A.D. 2nd 869, 392 N.Y.S. 2nd 383, on the opinion below (2nd Dept., 1976). However, *Clarke* was not only decided prior to this Court's decision in *Elrod,* but involved a State Court interpretation of New York State Civil Service Law. Nowhere, in *Clarke,* was political intrusion upon a First Amendment right claimed as a ground for relief. Because of the entirely different thrust of the claim under State Law, the Court in *Clarke* was more concerned with plaintiff's statutory job description than with the duties which he actually performed. However, in the case *sub judice,* District Judge BRODERICK obviously applied the correct standard by ascertaining, from the testimony of past and present Public Defenders, as well as Assistant Public Defenders, the actual duties performed by the respondents. Petitioner would have this Court substitute the conclusory judgment of

its witness, the Rockland County Personnel Director, a member of the same political party attempting to terminate respondents' services (141), in lieu of the detailed, factual tesimony of all the witnesses who actually served and worked with Assistant Public Defenders.

It would seem pertinent, prior to discussing the specific duties of respondents herein, to attempt to ascertain the intended parameters of confidentiality and policy-making as laid down by this Court. The *Elrod* plurality sets forth guidelines, at least for policy-making, with the caveat that it is the state's burden to demonstrate an *overriding* interest in order to validate an encroachment upon constitutionally protected rights (emphasis supplied), 427 U.S. 368. The plurality further suggests inquiry into the scope of responsibility, advisory capacity and implementation of broad goals as criteria for ascertaining those who are policy-making employees.

We believe that it would be helpful to consider not only the ground rules as set forth by this Court in determining confidentiality and policy-making, but the rationale behind their exclusion from the protective umbrella of *Elrod.* The plurality, in disposing of the argument that patronage is required to insure the political loyalty of employees to prevent the undercutting of representative government by tactics obstructing the implementation of policies of the new administration, permits patronage dismissals limited to those in a position to thwart the goals of the new administration. It would be reasonable to assume that the same rationale applies to confidential employees, i.e., their designation as such would be based upon their ability to thwart the goals of the party in power.

Let us now consider respondents' duties in light of that reasoning. Respondents would pick up files at the Public Defender's office for the Courts which they were assigned to defend indigent defendants, review those files and proceed to appear in Court. If there was any question with regard to eligibility for representation, an adjournment would be requested for determination by the Public Defender. Respondents had no voice in the overall operation of the office, nor were there any confidences between the Public Defender and his assistants other than the usual employer-employee relationship (85-86, 106-107). The respondents were neither department nor bureau heads nor even supervisory personnel (97, 106). Although given some latitude with regard to case-by-case decisions, respondents were still required to work within the policy framework set down by their supervisor (100).

Frank Barone, former Public Defender who supervised FINKEL for six years and TABAKMAN for more than two, clearly and unequivocally indicated that neither was a policy-making or confidential employee (55-56). Even petitioner conceded that his assistants' policy-making latitude was limited to their individual cases (178).

A review of respondents' duties clearly indicates that they were not, in any way, in the position to obstruct or thwart the goals of the incoming Public Defender. Because of their limited discretion, the only way they could embarrass or discredit their newly appointed supervisor would have been through the improper performance of their case-by-case duties. Even assuming that professional attorneys would violate their oaths in such fashion there are clearly less constitutionally intrusive procedures for dealing with that situation. Specifically, employees may always be discharged for good cause such as insubordination or poor job performance, when those bases, in fact, exist. *Elrod,* Page 366.

The District Court has set forth an incisive reading of this Court's intent in conjoining confidentiality with policy-making, keeping in mind the ability of the confidential employee to thwart or undermine his principal's goals. Petitioner's own witness, Mr. Anderson, indicates positions which typify such confidential relationship such as secretary to the District Attorney, confidential secretary to the President of the Community College, and Assistant to the Chairman of the County Legislature (137). To effectuate the *Elrod* principle, such positions must be limited to a so-called, "right-hand man;" to confuse the term, "confidential" with the broad job requirement that a supervisor have "confidence" in his subordinate would render *Elrod* moot.

POINT III

Petitioner's *Mt. Healthy*—Same Decision Anyway Defense Was A *Post Hoc* Rationalization.

Subsequent to its decision in *Elrod*, this Court, in *Mt. Healthy City Board of Education* v. *Doyle,* supra, logically concluded that a plaintiff in an *Elrod* suit may not, by invoking a constitutional privilege, prevent his termination as the result of other non-constitutionally protected activities. In what has come to be called the "same decision anyway" defense, this Court held that a governmental agency possessed of grounds other than constitutionally protected activities, was within its rights to discharge an employee if those grounds, irrespective of the exercise of free speech,

would have justified such dismissal This, in *Mt. Healthy,* where there existed multiple grounds for the plaintiff's discharge, in discounting consideration of his constitutionally protected free speech right, the employer was entitled to prove that it would have reached the "same decision anyway."

It is an ancient, well accepted and, indeed, very practical rule of Federal construction which grants great weight to the findings of a trial Court where candor and credibility of the witnesses can best be judged. *United States* v. *United States Gypsum,* 333 U.S. 364, 395-396 (1948). This is true even though the Appellate Court, based upon the written record, might be persuaded to come to a different conclusion. *Martin* v. *Vector Company, Inc.,* 498 F. 2nd 16 (1st Circuit, 1974).

It is obvious that District Judge BRODERICK, having heard petitioner herein testify on two separate occasions, simply did not believe that anything other than political considerations played a part in his refusal to retain respondents in employment. Thus, the factfinder specifically states that one of the alleged grounds for the refusal to reappoint respondent FINKEL was, "merely a *post hoc* rationalization * * * devised late in the hearing process in an effort to thwart what was apparently perceived to be plaintiffs' promising development of the case." Judge BRODERICK's disbelief of petitioner's testimony is underlined at footnote 11, wherein he finds, "At the second set of hearings BRANTI, apparently believing that the case was not going well, changed his testimony. I do not credit his later testimony, which was apparently structured to meet the perceived needs of the litigation as it developed." 457 F.Supp. 1292.

The trial Court's reservations concerning petitioner's veracity are well borne out by the record, despite petitioner's contention that his testimony was uncontroverted. Although alleging a poor opinion of respondent TABAKMAN in 1975 (376) petitioner told TABAKMAN, in December of 1977, that he would have liked to keep him in the office but did not have the power to make that appointment (108). As a further reason for not continuing TABAKMAN in office, BRANTI referred to an ethics opinion of the New York State Bar Association, but, under examination by the Court, admitted that he did not read this opinion until some time subsequent to his attempt to terminate TABAKMAN, leading the Court to characterize it as a matter of complete indifference (372). Conclusive in the demolition of petitioner's "same dicision anyway" defense is the undeniable fact that none of these alleged "compelling" reasons were ever revealed by petitioner, to anyone, prior to the initiation of this legal action.

Petitioner may be correct in his statement that there was no conspiratorial design to replace all the Republicans with Democrats; what is apparent is that no-one would be appointed or reappointed Assistant Public Defender without the sponsorship of a Democratic County Legislator.

POINT IV

There Is No Conflict Between The Judicial Circuits Concerning The Applicability Of *Elrod vs. Burns.*

It is evident that petitioner has misread *Ramey* v. *Harber,* supra, in which the Circuit Court reversed the District Court's finding in favor of plaintiffs who were not retained in their positions as Deputy Sheriff. Al-

though there was some discussion by the Circuit Court majority of the effect of the Virginia law imposing definite terms on Deputy Sheriffs, even a cursory reading of the majority decision clearly indicates that the *sole* reason for the reversal was the Fourth Circuit's refusal to apply *Elrod* retroactively as the District Court had done. "Although there is some doubt regarding the applicability of *Elrod* in this case, *it is unnecessary to decide that question* in view of our conclusion on the issue of retroactivity. Therefore, for the purposes of disposing of this litigation, we assume without deciding that *Elrod* is applicable." (Emphasis supplied). Indeed, Circuit Judge HALL dissented solely, "Because I feared that the majority opinion may be read to imply that *Elrod* would apply prospectively on facts similar to this case * * *." In this case, not only did petitioner BRANTI's attempted infringement of respondents' first amendment rights occur after the decision in *Elrod;* he was actually advised by them of their intention to rely on this Court's holding should he persist in his efforts to deny them continued employment as Assistant Public Defenders solely because of their lack of political sponsorship (83-84).

CONCLUSION

For the above stated reasons, the decision of the District Court, unanimously affirmed by the Second Circuit of Appeals, should be affirmed by this Court.

Respectfully submitted,

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